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No. 89-333

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUE	1
INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE NINTH CIRCUIT PROPERLY FOUND THAT CONGRESS INTENDED THE COMMISSION'S LICENSE CONDITIONS TO CONTROL	6
A. The Comprehensive Regulatory Scheme of Part I Leaves No Room for Conflicting State Regulation of Minimum Flows	6
B. The 1986 ECPA Amendments to Part I Confirm the Commission's Exclusive Authority To Establish Minimum Flows That Are Appropriate To Protect Fish Resources	9
II. THE NINTH CIRCUIT PROPERLY FOLLOWED THIS COURT'S DECISION IN *FIRST IOWA*	12
III. THE NINTH CIRCUIT PROPERLY REJECTED THE BOARD'S EFFORT TO USURP THE COMMISSION'S POWER TO BALANCE AND RECONCILE COMPETING PUBLIC INTEREST CONSIDERATIONS	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

California v. Federal Power Comm'n, 345 F.2d 917 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965) 8
California v. United States, 438 U.S. 645 (1978) ..... *passim*
Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395 (1975) 6, 7, 11
Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952) 7, 8
Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955) 14
Federal Power Comm'n v. Union Elec. Co., 381 U.S. 90 (1965) 7, 8
First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946) ..... *passim*
National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 11
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 7, 15
Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 15
Pennsylvania Dept. of Env'n Resources v. Federal Energy Regulatory Comm'n, 868 F.2d 592 (3d Cir. 1989) 14, 15-16
Portland Gen. Elec. Co. v. Federal Power Comm'n, 328 F.2d 165 (9th Cir. 1964) 14
Scenic Hudson Preservation Conf. v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972) 14
Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 108 S.Ct. 1145 (1988) 6
Town of Springfield, Vt. v. McCarren, 549 F. Supp. 1134 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983) 14, 15
(1983) 14, 15
Washington Dep't of Game v. Federal Power Comm'n, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954) 14

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS: Page

Electric Consumers Protection Act of 1986, Public Law No. 99-495, 100 Stat. 1243 ..... *passim*
Federal Power Act (Part I), 16 U.S.C. §§ 791-823b
Section 4, 16 U.S.C. § 797 ..... 8, 10
Section 9, 16 U.S.C. § 802 13
Section 10, 16 U.S.C. § 803 ..... 8, 10, 16, 17
Section 27, 16 U.S.C. § 821 ..... *passim*
Code of Federal Regulations
18 C.F.R. § 4.41 8

ADMINISTRATIVE DECISIONS:

Joseph M. Keating, 42 F.E.R.C. ¶ 61,030 (1988) .. 12
Public Util. Dist. No. 1 of Skamania County, Washington, 32 F.P.C. 444 (1964) 12
Robert P. Wilson, 28 F.P.C. 571 (1962) 9, 12
Rock Creek Limited Partnership, 41 F.E.R.C. ¶ 61,198 (1987) 17-18
Rocky Mountain Power Co., 37 F.P.C. 329 (1967) .. 12

CONGRESSIONAL DOCUMENTS AND HEARINGS:

132 Congressional Record S-4448-49 (April 17, 1986) (remarks of Senator Baucus) 11
132 Congressional Record S-15107 (October 3, 1986) (remarks of Senator Johnston) 11-12
132 Congressional Record S-15384 (October 6, 1986) (remarks of Senator McClure) 11

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF THE ISSUE

The issue presented by the petition is whether a state agency has the power to override license conditions established by the Federal Energy Regulatory Commission for hydroelectric projects that are subject to the Commission's jurisdiction under Part I of the Federal Power Act.

INTEREST OF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies.[1] Its members serve 96 percent of all customers served by the investor-owned segment of the industry and 74 percent of all ultimate customers of electricity in the United States. A large number of EEI's members rely, either directly or through power purchase agreements, upon hydroelectric power to supply their customers' needs and to operate their electric systems.

Over the years, investor-owned utilities have developed, operated and maintained large numbers of hydroelectric projects, and today operate approximately 366 such projects pursuant to licenses issued by the Federal Energy Regulatory Commission or its predecessor, the Federal Power Commission ("Commission" or "FERC"). Each of these licenses contains conditions governing the projects' construction and operation, which conditions have been fashioned by the Commission, in the exercise of its judgment, to reflect and reconcile sometimes competing water use considerations (such as fish and wildlife, aesthetics, recreation, water quality, power plant capacity and energy output). By balancing all of these considerations and tailoring appropriate license terms and conditions, the Commission is able to ensure that the public interest, as a whole, is served by projects that are allowed to proceed.

Petitioner's view of Part I of the Federal Power Act[2] is fraught with negative ramifications extending far

[1] Pursuant to Supreme Court Rule 36.1, letters from the parties consenting to the filing of this brief have been submitted to the Clerk.

[2] The original Federal Water Power Act, 41 Stat. 1063 (1920), was amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. §§ 791-823b (1958 ed.), and made Part I of the Federal Power Act. The substance of the original Federal Water Power Act was left largely intact. Part I is sometimes referred to herein as the "Act" or the "FPA."

beyond the obvious effect on the Rock Creek project. To construe Part I as petitioner suggests would be contrary to the systematic and orderly licensing process established by Congress, and would have a direct chilling effect on the willingness of private enterprise to devote investment capital to the development of hydroelectric projects. As both current and potential project licensees, EEI's members have a unique and vital interest in the preservation of FERC's comprehensive regulatory responsibility and related preemptive powers under the Federal Power Act. Accordingly, EEI supports the decision of the Ninth Circuit Court of Appeals and opposes the petition for writ of *certiorari*.

SUMMARY OF ARGUMENT

The Court should deny *certiorari* in this case because petitioner advocates a scheme of duplicative state and federal regulation that Congress, and this Court, properly rejected long ago as undesirable and unworkable. In the decision below,[3] the Ninth Circuit correctly found that: (i) the comprehensive scope of the Federal Power Act evidences congressional intent to preempt state regulation of jurisdictional hydroelectric projects, except for the limited proprietary exceptions specified in Section 27; (ii) this Court's dispositive decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*[4] (construing the Federal Power Act) was unaffected by its subsequent decision in *California v. United States*[5] (construing the Reclamation Act of 1902) because the two statutes serve different objectives and relate to fundamentally dissimilar federal programs; and (iii) allowing the Board to override the minimum flow rates prescribed

[3] *State of California, ex rel. State Water Resources Board v. Federal Energy Regulatory Comm'n*, 877 F.2d 743 (9th Cir. 1989) (hereinafter "*California v. FERC*").

[4] 328 U.S. 152 (1946) (hereinafter "*First Iowa*").

[5] 438 U.S. 645 (1978) (hereinafter "*California*").

in the license would constitute a "veto power" over the project approved by FERC because such a change would directly affect the project's ability to generate electricity, thereby jeopardizing its economic feasibility. None of petitioner's arguments merit this Court granting further review of these determinations by the lower court, which are all supported by the language of the FPA, judicial precedent and sheer logic.

The controlling decision in *First Iowa* reflects a painstaking analysis of the provisions the Federal Power Act, including an examination of its underlying purpose, its legislative history and its functional application by the Commission. That analysis led this Court to conclude that the restrictive reference in Section 27 to "the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein" saves from federal preemption only those few state laws dealing with water rights of a proprietary nature.[6] In all other respects, Congress sought to "occupy the field" in the area of federally-licensed hydropower projects. This result is not only in accord with the plain language of Section 27, but is also the only interpretation that permits the regulatory scheme established by Congress in the FPA to operate in a rational and orderly manner.

During the more than forty years since *First Iowa*, this Court and Congress have had ample opportunity to change the result of that decision, but neither has done so. Whereas petitioner seems to argue that *First Iowa*

[6] Although initially making reference to that restrictive portion of Section 27 saving from preemption only state water laws relating to "water used in irrigation or for municipal or other uses," petitioner later discards that critical phrase from its discussion. Utilizing the expedient of omission, petitioner then improperly proceeds to argue that Section 27 was meant to save from preemption *all* state laws pertaining to water rights. (Petition, pp. 6, 15, 17).

was impliedly overruled by the 1978 decision in *California*, it neglects to mention that this Court has continued to cite *First Iowa* with approval. Moreover, *First Iowa* has been followed consistently and without conflict by three Circuit Courts of Appeal to determine the proper relationship between FERC's comprehensive regulatory authority under Part I and those state laws saved from preemption by Section 27. Not one of these lower courts has questioned the status, reasoning or result of that decision.

Finally, Congress has periodically addressed the regulatory scheme established under Part I, most recently in connection with the passage of the Electric Consumers Protection Act of 1986.[7] ECPA amended Part I of the FPA to make clear that FERC must give equal consideration during the licensing process to the protection and enhancement of fish and wildlife and must give due weight to the related recommendations of state and federal agencies. However, the ultimate authority to reconcile competing public interest concerns and to develop license conditions that are consistent with the purposes and requirements of the Act was left, as before, with the Commission. These ECPA amendments and the associated legislative history confirm that FERC's decision regarding the appropriate minimum flow regime to protect fish resources, as reflected in the Rock Creek license conditions, preempts the Board's effort to impose a different requirement on the project.

[7] Pub. L. No. 99-495, 100 Stat. 1243 (Oct. 16, 1986) (hereinafter "ECPA").

ARGUMENT

I. THE NINTH CIRCUIT PROPERLY FOUND THAT CONGRESS INTENDED THE COMMISSION'S LICENSE CONDITIONS TO CONTROL

A. The Comprehensive Regulatory Scheme of Part I Leaves No Room for Conflicting State Regulation of Minimum Flows

In order to determine how Congress intended to divide regulatory authority over hydroelectric projects between the states and the federal government, the Ninth Circuit undertook a traditional preemption analysis that focused on the FPA as a whole, as opposed to examining individual sections of the Act in isolation. *See, e.g., Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395, 403 (1975) ("[T]heir assertion . . . is refuted when § 4(e) is read together with the rest of the Act as, of course, it must be."). This approach is necessary because preemption may be either expressed (explicitly stated in the statute's language) or implied (implicitly contained in the statute's structure and purpose). Even where Congress has not entirely displaced state regulation in a particular field, a conflict with federal law exists: (i) when it is impossible to comply with both state and federal law; *or* (ii) where the state law stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S. Ct. 1145, 1150-1151 (1988) (quoting *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987)). The Ninth Circuit's examination of various provisions of the FPA led it quickly to conclude that "[t]he weight of the comprehensive planning authority and the individual powers assigned to support that authority falls quite heavily on the side of federal exclusivity". *California v. FERC*, 877 F.2d at 747 (analyzing the Commission's powers and responsibilities under Sections 4(e), 4(f), 4(g), 5, 6, 7(a), 10(a), 13, 14(a), and 21 of the Act).

The determination of federal preemption by the Ninth Circuit is entirely consistent with a host of decisions by this Court identifying the purposes and objectives of the FPA. As explained in *Federal Power Commission v. Union Electric Co.*:

> The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious.

381 U.S. 90, 98 (1965) (footnote omitted). Thus, the FPA was intended to provide

> . . . a method by which the water powers of the country, wherever located, [could] be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. . . . The problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies.

First Iowa, 328 U.S. at 180-81 n.23 (quoting statement by David F. Houston, Secretary of Agriculture, quoted in H.R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1920)).[8]

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[8] *See also New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) ("national concern for planning, development, and comprehensive utilization of the country's water resources"); *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. at 404 n.8 (development of water power to satisfy the requirements of a growing economy); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 23 (1952) ("the Commission is plainly made the guardian of the public domain"); *First Iowa*, 328 U.S. at 171 ("a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation").

In many respects, the Commission's comprehensive balancing authority under Section 10(a) of the FPA constitutes the heart of federal regulation over the development of hydroelectric projects. 16 U.S.C. § 803(a); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. at 22-23; *Federal Power Comm'n v. Union Elec. Co.*, 381 U.S. at 100-01; *California v. Federal Power Comm'n*, 345 F.2d 917, 923 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965). The Commission serves as the guardian of the public interest because no license for a hydroelectric project shall be granted unless, *in the judgment of the Commission*, that project is best adapted to a comprehensive plan for: (i) improving or developing a waterway for the use or benefit of commerce; (ii) the improvement and utilization of water power development; (iii) the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat); (iv) irrigation; (v) flood control; (vi) water supply; (vii) recreation; and (viii) other beneficial public uses. *See* Sections 4(e) and (10)(a), 16 U.S.C. §§ 797(e), 803(a). Under this mandate, FERC must "consider the whole picture" and exercise its judgment to determine whether and under what conditions a project license will issue.[9]

As part of its evaluation of the Rock Creek project, the Commission had to decide how much water flow must

[9] The Commission's regulations implementing Part I further manifest the comprehensive nature of federal control over hydropower projects within its jurisdiction. *See, e.g.*, 18 C.F.R. § 4.41 (outlining studies required as part of a license application). Of particular relevance to the case at hand is the required statement concerning the operation and utilization of the project, including detailed information on the establishment of minimum stream flows. These flows necessarily impact plant capacity and output. 18 C.F.R. § 4.41(c). An applicant must also provide an extensive environmental report containing, among other things, a report describing the fish, wildlife and botanical resources in the vicinity, the expected impacts of the project on those resources, and any proposed mitigation, enhancement and protection measures. 18 C.F.R. § 4.41(f).

be left in Rock Creek for fishery protection and other purposes ("minimum flows"), as opposed to being diverted, passed through the powerhouse and then returned to its original course at a point down stream. *California v. FERC*, 877 F.2d at 744. This determination had a direct bearing on the underlying decision to issue the license, because every drop of water required for minimum flows would be unavailable for power generation. An applicant must be able to demonstrate that a proposed project is economically feasible, or else the license will be denied. *See, e.g., Robert P. Wilson*, 28 F.P.C. 571, 574 (1962). In this instance, the Commission concluded that the water remaining for power production, after allowing adequate minimum flows to protect fishery resources, was sufficient to make the project financially sound. Having struck this balance, the Commission issued a license conditioned accordingly.

To allow the Board to override the Commission's judgment by prescribing a minimum flow regime different (either higher or lower) from that established by FERC would be to vitiate the comprehensive authority that Congress specifically entrusted to the Commission under the Act. Moreover, the stated reason for the Board's action (protection of trout resources) is among the enumerated considerations that the Commission is required to weigh in determining whether a project is in the public interest. Under these circumstances, the state law that petitioner seeks to enforce clearly and directly conflicts with the federal regulatory scheme, and thus was properly found by the Ninth Circuit to be preempted.

B. The 1986 ECPA Amendments to Part I Confirm the Commission's Exclusive Authority To Establish Minimum Flows That Are Appropriate To Protect Fish Resources

Through amendments to Part I under ECPA, Congress has recently confirmed the Commission's exclusive

role in establishing appropriate license conditions, in particular conditions setting minimum flows designed to protect and promote fish and wildlife resources. Section 10(a) of the Act was amended to make clear that the protection of fish and wildlife (including related spawning grounds and habitat), irrigation, flood control and water supply are among the many public interest considerations that the Commission must balance pursuant to its comprehensive regulatory authority. An amendment to Section 4(e) also clarified that environmental aspects of a proposed project must be given "equal consideration" in that balancing process. Finally, Congress directed the Commission to give consideration to the recommendations of state and federal fish and wildlife agencies. If such recommendations are not incorporated in the license, Section 10(j) now requires the Commission to make a specific finding that such recommendations are inconsistent with the purposes and requirements of the Federal Power Act and that the license conditions FERC has adopted in lieu of those recommendations adequately protect fish and wildlife. 16 U.S.C. § 803(j).

The ECPA amendments described above are significant because they evidence congressional intent opposite to that suggested by petitioner. If, as a consequence of Section 27, individual state agencies were truly free to impose their own minimum flow requirements in the name of fish protection, then Congress would not have gone to the trouble of etablishing these new statutory obligations, in particular Section 10(j). Indeed, a state agency would not have to bother to submit its recommendations to the Commission at all if Section 27 saved from preemption state laws pursuant to which that agency could at any time impose its wishes directly on the project licensee. Congress was well-aware of the existing case law on this subject (including *First Iowa*), and did

nothing to change the outcome of those decisions when it enacted ECPA.[10]

The legislative history pertaining to ECPA further emphasizes the Commission's dominant authority to establish conditions under which FERC-licensed hydroelectric projects will operate. Senator McClure, chairman of the ECPA conference committee, confirmed the Commission's continued role as sole arbiter of competing public interest concerns when he stated that "[n]either [the Senate nor the House] considered giving the fish and wildlife agencies the same type of mandatory conditioning authority which they have under section 30(c) for exemptions. *Neither did either body want in any way to interfere with the role of FERC in balancing competing values.*" 132 Cong. Rec. S-15384 (October 6, 1986) (emphasis added). Another member of the conference committee, Senator Johnston, expressed the same forceful view of FERC's exclusive authority to establish appropriate license conditions:

> By [including the phrase "equal consideration" in amended Section 4(e)] we made it clear that FERC must consider fish and wildlife needs equally with the development purposes for which licenses are is-

[10] Immediately prior to passage of the Senate version of ECPA, an amendment to Part I was introduced designed to give individual states greater control over appropriation, diversion and use of water by FERC licensees. 132 Cong. Rec. S-4448-49 (April 17, 1986). The amendment was withdrawn on condition that the Senate Committee on Energy and Natural Resources hold a hearing to examine the suggestion, which it did on September 12, 1986. In the end, no amendments along these lines resurfaced and the Commission's licensing jurisdiction was left fully intact. This history confirms the correctness of the Supreme Court's conclusions in *First Iowa*, and also evidences Congress' satisfaction with the Commission's exercise of its jurisdiction pursuant to that decision. *See, e.g., Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. at 410; *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982).

sued. However, the amendment to section 4(e) also makes clear that while full and genuine consideration of fish and wildlife is required, equal treatment is not. Instead, *the reconciliation of power and other development needs with fish and wildlife needs in cases of conflict is ultimately left to the public interest judgment of the Federal Energy Regulatory Commission.*

132 Cong. Rec. S-15107 (October 3, 1986) (emphasis added).

The ECPA amendments reaffirmed the scope of FERC's authority.[11] Congress, then as now, intended for the Commission to have exclusive authority to balance and, when necessary, to reconcile the various interests competing for the use of the waterway.

II. THE NINTH CIRCUIT PROPERLY FOLLOWED THIS COURT'S DECISION IN *FIRST IOWA*

Although independently evaluating the preemptive effect of the operative provisions of the FPA, the Ninth Circuit clearly recognized and followed this Court's decision in *First Iowa*, particularly as it related to the congressional intent underlying Section 27. *California v. FERC*, 877 F.2d at 747-50. In an effort to evade that dispositive precedent, petitioner alternatively argues that *First Iowa*'s analysis of Section 27 is *dictum*, or that the

[11] Even before the enactment of ECPA, the Commission had evidenced a clear understanding that its comprehensive regulatory responsibility entailed the careful balancing of a wide range of public interest considerations, among which were the same environmental and wildlife concerns cited by the Board as the basis for its proposed minimum flows. *See, e.g., Rocky Mountain Power Co.*, 37 F.P.C. 329 (1967); *Public Util. Dist. No. 1 of Skamania County, Washington*, 32 F.P.C. 444, 450 (1964); *Robert P. Wilson*, 28 F.P.C. 571 (1962). After ECPA, the Commission's analysis of environmental factors has become even more detailed. *See, e.g., Joseph M. Keating*, 42 F.E.R.C. ¶ 61,030 (1988).

decision "conflicts" with this Court's subsequent decision in *California*. Petitioner's arguments on both points are without merit.

Contrary to the wishful characterizations repeatedly offered by petitioner, the interpretation of Section 27 in *First Iowa* was not gratuitous "dictum," but instead was a necessary and integral part of the fundamental analysis. (Petition, pp. 5, 9, 10). To determine the role left to the states in the area of hydroelectric development, this Court was required to discern the intent of Congress in both Section 9(b) (now Section 9(a)(2)) and Section 27, and to reconcile those sections with the other provisions of the regulatory scheme Congress had established. After a careful examination of Part I and the underlying legislative history, this Court described the role of Section 27 as follows:

> [C]ongress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the states so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the state and Federal Governments, is illustrated by the careful preservation of the separate interests of the states throughout the Act, *without setting up a divided authority over any one subject.*
>
> Sections 27 and 9 are especially significant in this regard. Section 27 expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act.
>
> • • • •
>
> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights.
>
> • • • •

> This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.

328 U.S. at 174-76 (supporting footnotes omitted, emphasis added). "Construing section 27 and other parts of the FPA was essential to the [Supreme] Court's preemption analysis of section 9(b)" and, for this reason, the Ninth Circuit properly noted that "[d]ismissing *First Iowa*'s comments on Section 27 as *dicta* is improper." *California v. FERC*, 877 F.2d at 749.

The Ninth Circuit's reliance on the reasoning and result of *First Iowa* for substantive guidance in interpreting the FPA was well-placed. To allow the Board to override FERC's judgment regarding duplication of two authorities over the same subject matter was condemned by this Court as totally unworkable. *First Iowa*, 328 U.S. at 171. Part I instead reflects an integration of state and federal power that has resulted in a smoothly functioning division of regulatory authority. *First Iowa*, 328 U.S. at 171; *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 445-46 (1955); *Pennsylvania Dept. of Env'n Resources v. Federal Energy Regulatory Comm'n*, 868 F.2d 592, 599-600 (3d Cir. 1989); *Town of Springfield, Vt. v. McCarren*, 549 F. Supp. 1134, 1154-57 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983); *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 453 F.2d 463, 479-80 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *Portland Gen. Elec. Co. v. Federal Power Comm'n*, 328 F.2d 165, 176 (9th Cir. 1964); *Washington Dep't of Game v. Federal Power Comm'n*, 207 F.2d 391, 395-96 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

Nor is there any merit to petitioner's suggestion that the decision in *California* (construing the Reclamation

Act of 1902) conflicts with or implicitly overrules *First Iowa*. In the Reclamation Act, Congress did not implement a comprehensive scheme and therefore left room for the operation of some state regulation. In the Federal Power Act, however, the federal government exercised jurisdiction by establishing a specialized agency with plenary control and authority to evaluate hydroelectric projects within the agency's jurisdiction in light of comprehensive criteria. Moreover, this Court has continued to cite *First Iowa* with approval even after its decision in *California*. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. at 338 n.6.

Furthermore, there is no conflict among the circuits concerning the continued validity of the reasoning and rationale underlying *First Iowa*. In *Town of Springfield v. McCarren*, *supra*, the court carefully compared the extent to which federal authority was exercised under the Reclamation Act as compared to the Federal Power Act, concluding that the two statutes "serve different objectives, and relate to federal actions fundamentally dissimilar in nature." *Id.* at 1154. Under such circumstances, state regulation was found to be foreclosed by the FPA. *Id.* at 1156. The Ninth Circuit specifically agreed with that assessment of the differing preemptive effect of the two statutory schemes, and therefore found no tension at all between this Court's decisions construing them. *California v. FERC*, 877 F.2d at 749.

Just recently, the Third Circuit has joined the Second and Ninth Circuits in following the interpretation of Section 27 found in *First Iowa*. The court stated:

> The Federal Power Act does not permit interference with certain state laws relating 'to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature.'

> However, the state law provisions relating to pollution, flood control, aesthetics and recreation, and natural resource conservation, that [the state agency's] license affects, do not fall within this narrow class.

Pennsylvania Dep't of Env'n Resources v. FERC, 868 F.2d at 598 (citations omitted).

If petitioner's Reclamation Act argument had any substance at all, then surely one of the three circuit courts that have directly considered the proper relationship between Section 27 of the FPA and state water laws would have perceived this alleged conflict. None has done so. Instead, each of these courts has embraced *First Iowa* without question or criticism.

III. THE NINTH CIRCUIT PROPERLY REJECTED THE BOARD'S EFFORT TO USURP THE COMMISSION'S POWER TO BALANCE AND RECONCILE COMPETING PUBLIC INTEREST CONSIDERATIONS

Beyond the fact that FERC's affirmative exercise of its statutory authority preempts the Board's consideration of the same minimum flow/fishery resources issue, there are compelling practical and policy reasons why petitioner's attack on the Commission's authority to establish binding license conditions must fail. Under the mandate of Congress, and in particular Section 10(a), FERC's analysis of the public interest is multi-faceted, and the license conditions produced by its deliberative process are required to serve the public interest as a whole. In contrast, individual state agencies often will have a narrow, single-issue focus, and thus may disregard other equally important aspects of a project. Such agencies may simply lack the broad expertise, possessed by FERC and its staff, that is needed to review and appreciate other water resource values. For whatever reason, there is certainly no assurance that their decisions will

recognize, let alone serve, the broad public interest that the Commission is required to guard.

The danger of considering aspects of the public interest on a piecemeal rather than a unified basis is typified by the Board's astounding assertion that the higher minimum flow requirements it desires do not "conflict with the FERC flow requirements, because the state requirements are more stringent." (Petition, p. 24). This simplistic analysis ignores the fact that releasing more water for greater minimum flows in Rock Creek necessarily diminishes the power value of the hydroelectric project. As explained by the Commission in its decision below:

> In considering and balancing all aspects of the public interest as we are required to by Section 10(a) in determining whether, and under what conditions, a license should issue, we must balance, *inter alia*, the need to protect environmental interests with the need for the power to be produced by the projects. In so doing, we prescribe conditions, such as those relating to minimum flow releases, that we believe will provide the appropriate level of environmental protection and energy generation and will not issue a license if the conditions we deem necessary to protect environmental resources would render a project economically infeasible.
>
> Interpreting Section 27 as granting to the states the authority to prescribe minimum flow releases for projects, as advocated by WRCB, would render meaningless our comprehensive planning authority and responsibility under Section 10(a). After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state. By imposing higher minimum flows than prescribed in a license, a state could require greater environmental protection than we determined necessary and could

> cause a project to become economically infeasible. Conversely, by imposing lower minimum flows than prescribed in a license, a state could require the operation of a project providing less environmental protection than we found necessary in issuing the license.

Rock Creek Limited Partnership, 41 F.E.R.C. ¶ 61,198, p. 61,515 (1987).

Were individual state agencies to be given the authority proposed by petitioner, they would each have the power to impose in effect an economic veto on a proposed project or, perhaps even worse, to render a licensed project economically infeasible after it has been constructed. Furthermore, a state agency could disregard important national objectives of Congress. Either way, petitioner's position is untenable and its approach unworkable.

Practically speaking, there can be only one decision-maker respecting the operating conditions of a licensed project—a single decision-maker charged with the responsibility of protecting the interests of everyone and authorized to make the necessary "judgment calls" involved in that balancing process. Suppose, for example, a licensed storage project were to be built near a state line, with the reservoir located primarily in one state and the dam and tailrace areas located in the other. Under petitioner's view of the Federal Power Act, which state's concerns would dominate: the one where the reservoir is located (perhaps most interested in seasonal elevations, recreation and shoreline aesthetics), or the state where the dam and tailrace are located (perhaps most interested in safety and the downstream needs of fish and wildlife)? Where does the license applicant go to avoid being caught in the middle of the resulting "tug of war," as equally-matched agencies within those two states strive to protect their respective, competing parochial concerns? The obvious answer to such jurisdictional chaos is a single national authority—the Commission.

CONCLUSION

The Ninth Circuit recognized that the dual regulatory approach advocated by petitioner would be totally unworkable, and would expose hydroelectric project licensees to conflicting directives from multiple decision-makers. Under the Federal Power Act, the Commission is directed to balance *all* aspects of the public interest to determine whether a license should issue and under what conditions the project should operate. This is the orderly regulatory scheme established by Congress; it is the only process that will work. The petition for a writ of *certiorari* is without merit, and should be denied.

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